

WORKERS' COMPENSATION INDUSTRIAL COUNCIL

APRIL 26, 2011

Minutes of the meeting of the Workers' Compensation Industrial Council held on Tuesday, April 26, 2011, at 1:00 p.m., Offices of the West Virginia Insurance Commissioner, 1124 Smith Street, Room 400, Charleston, West Virginia.

Industrial Council Members Present:

Bill Dean, Chairman
Kent Hartsog, Vice-Chairman
Bill Chambers
James Dissen
Dan Marshall

1. Call to Order

Chairman Bill Dean called the meeting to order at 1:00 p.m.

2. Approval of Minutes

Chairman Bill Dean: The minutes were sent out for the previous meeting of March 22. Did everybody have a chance to look them over?

Kent Hartsog made the motion to approve the minutes from the March 22, 2011. The motion was seconded by Dan Marshall and passed unanimously.

4. Office of Judges Report – Rebecca Roush, Chief Administrative Law Judge

Judge Rebecca Roush: Good afternoon. I forwarded the Office of Judges report to you yesterday. We anticipate that we'll have the same number of protests filed this coming year as we did last year. For March we had 493 protests acknowledged, and for all of the 2011 we had a little over 1,200 protests filed. We project that we'll have about 5,048 protests this year.

Are there any specific questions that I might be able to address about the report?

Chairman Dean: Mr. Marshall, do you have any questions for Judge Roush?

Dan Marshall: No, Mr. Chairman.

Chairman Dean: Mr. Hartsog?

Kent Hartsog: First of all, thank you guys for breaking out the final decisions into the categories like I requested the last time. That looks good. Also, just if you could talk for just a second on those percentages and what would you see as impediments to keep ratcheting the percentages more into the 30 to 60 which is where the bulk. . .or under 60 I should say is where the bulk of them are, or the less than 30-day category.

Judge Roush: Right. First of all the numbers have improved for 2011 than they were for 2010. We have met with all of judges individually. They do know that it is our requirement to have a final decision come out within 60 days of the protest being submitted for a final decision. With that said, I think there are a number of factors that might play into that 5.8% and overall 6.7% for 2011 that you see on this report.

First of all, we've had two judges leave. The judges that remain do have an increased case load. We had one judge resign and one judge retire within the last six months. There is an increased work load on the remaining judges. The second factor I would say is the complicated nature of some of the cases that we currently have pending. I just met with one of the judges today. She was discussing with me a final decision on a dependent's benefits case that was extremely complex and the parties had argued rather new interpretations of rules and statutes. She said, "You know, I didn't get this out within the 60 days but it's only a few days over that. Due to the complicated nature of the decision that I was making it took a little longer than usual." They are trying to balance making the decisions with their regular inventory with those cases that are pretty complex and sophisticated. That is the answer to that.

Mr. Hartsog: Are you trying to replace the judges that left or are you just trying to get it done with less people?

Judge Roush: Right now we are trying to get it done with less people. No formal announcement has been made, but we do have a couple of judges that have said they are considering retiring this summer. Once that takes place, when we get some formal announcement, we may need to look for a replacement. But at this time with the present caseload I think we are okay. And the number, of course. . .5.8% of our decisions is not a huge number when it's calculated out to what the actual number would be.

Mr. Hartsog: No, it's not. Obviously, I would like to see it – and it has improved – but kind of ratchet back down to even into the 30-day category. That will take a long time and you've got to balance your manpower with the timeliness of decisions.

Judge Roush: Right. Well, it's definitely something we can consider. I personally feel that we could. . .with the number of protests that we have now, with the number of judges we have deciding them, I think we are at just the right number. I can take that back to our judges and pass it along. Of course, we could also talk about hiring another judge.

Mr. Hartsog: Thank you.

Chairman Dean: Mr. Dissen, do you have any questions?

James Dissen: No, sir.

Judge Roush: I just have one more thing. I brought with me for your consideration the Timothy E. Davies decision that the Supreme Court of Appeals filed on April 1, 2011. I am not certain if you've heard of that or not, so I brought a copy for each of you. This case involves a hotly contested issue that's been in litigation for quite some time regarding carpal tunnel syndrome and the use of Rule 20 in limiting the awards to 0% to 2%, 2% to 4%, and 4% to 6% for mild, moderate and severe carpal tunnel. I think the Court's Opinion leaves a lot of questions still outstanding, but the bottom line is on Syllabus point 3. They found that W. Va. C.S.R. §85-20-64.5 is invalid. It cannot be applied to carpal tunnel syndrome impairment ratings assessed under Table 16 of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th edition). It didn't assess any other Table, just use of Table 16. We are reviewing our current inventory to see if we have any cases where this Opinion applies. I thought I would pass that along.

Chairman Dean: Thank you.

4. Open Meetings Training by Theresa Kirk

Theresa Kirk, Executive Director of the WV Ethics Commission: My name is Theresa Kirk and I am the Director of the West Virginia Ethics Commission. We do ethics for open meetings and I am here today for an Open Meetings Training. Before we get started I would like to see who in the room has ever sat through an Open

Meetings Training. So I have an audience that I can tell whatever to and you'll believe it.

This is going to be informal. You can jump in with questions at any time if it's okay with the Chair.

Chairman Dean: Sure.

Ms. Kirk: I'll take questions from the audience. A little bit of trivia. We have appointed Commissioners – much like you all – appointed by the Governor. We also have an Open Meetings Committee within our Commission. And today we also present, just by chance, the former Chair of our Open Meetings Committee, Brad Crouser. He has since left the Commission. But if you don't like any of these decisions, you can blame some of it on Brad.

I would assume that most of you on the Council come from the private sector. Is that fair enough? I, too, came from the private sector, and it was nice because we had partner meetings. We could say whatever we want. We could call each other at all hours of the day, and it wasn't required to be in the Open. We'd like to think we operated pretty efficiently. And then the challenge of government – and there is a reason for it – is you come in as a governing body. You are not private industry. You are a public body subject to the Open Meetings Act. So some of the things that we did in the private sector, we can't do as a member of a governing body. So, let's talk about some of those.

First, as a public body, members of the public are invited, and they are here today. Back in 2009 we had a County Commission ask us this question: "May former members of the Commission text message each other during the course of a public meeting?" We know you folks sitting around, you can text message and do whatever you want out there. Members of the governing body – nobody's got their iPhone out texting. We just had one bring one out. Do you have an opinion on that?

Mr. Hartsog: No, actually I don't.

Ms. Kirk: No opinion?

Mr. Hartsog: No opinion.

Ms. Kirk: That's always a conservative answer. Technology has interjected new things into Open Meetings. Back in 1975 when our Open Meetings Act came out about,

we didn't have computers, e-mail, iPhones. But technology has brought a new aspect to it. And the decision of the Committee was, well no, a quorum can't text message each other during the meeting. Because as you can appreciate, if a motion is before you and you have to decide on it, then the Chair couldn't whisper to the person to the left, "How are you going to vote?" And so on down the line because members of the public are going to say, "What are they doing?" Actually you're holding your discussion outside of earshot of the folks sitting around the room. So, for that reason you likewise couldn't set up a chain where you start text messaging down the way. By the time the vote comes up magically there is no discussion and everybody votes the same way.

Now not all communications amongst the quorum are prohibited. For example, let's say that you're out in the hall and you're deciding when you're going to have the next meeting and you say, "Oh, this one falls near July 4th. Maybe we should move it." Well, that's a scheduling matter, so you could discuss matters such as that amongst yourselves outside of the meeting.

We have an Opinion coming up at this month's meeting – next Thursday – where a County Commission asked us, "All right, if staff of the County Commission is having a staff meeting, may a quorum of the County Commissioners go to the staff meeting?" I believe what the proposed Opinion will say, "No. In fact, a quorum of the governing body can't attend the staff meeting." And the reason for that is at the staff meeting – and the facts set this forth – various reports are received, like the attorney gives a report, a county administrator. And based on past Opinions, and some Supreme Court cases, it just seems too broad for problems to allow a quorum of the governing body to go to a staff meeting. Because if the attorney is giving an update on the caseload – the update we just heard – and you all decided to start asking the questions you just did, in a way you are communicating about a matter which may later require official action. For example, a request on a report that this information be added, or action in regard to "well we need to get these cases done in this many days." We haven't issued that Opinion. But once again, that will be issued next month. And you can always look at our Open Meetings' Opinions online. In the handout I've given you today, I've given you our website. From time to time we have an Open Meetings Act booklet. If anybody in the audience has clients they train on these things, or if they are a member of a governing body, we do have the booklet and we have the various Opinions as well.

I'm going to talk about a couple other scenarios. Let's turn back to technology. Do you receive your hard copies of your packets in the mail or are they e-mailed to you?

Mary Jane Pickens (General Counsel, OIC): They are e-mailed, and they receive hard copies when they come to the meeting.

Ms. Kirk: With technology we're seeing more scanning and sending, and that's absolutely fine. Staff can communicate with you in memorandums. With your packet they can send it out to you via e-mail or U.S. mail. Now what you might be careful about is – in the technology world – if you get the packet, you don't want to start e-mailing back and forth about the contents of the packet. For example, you all get it and then you do a "reply all" to Mary Jane and you say, "What about this? I find this disturbing." And then somebody else weighs in. You're having a conversation in cyberspace. And once again that communication is suppose to occur during an Open Meeting, so you want to be very careful about that. Once again, it could be e-mailed. A straight e-mail saying, "Wow, this is a big packet," or something to that effect would be permissible, but otherwise you need to be careful.

On matters you are going to act on do need to be listed on your agenda. I've looked at your agenda and it looks quite thorough. One thing you want to be careful about, you've got some items on it – "new business and old business." And under those generic headings it may be permissible to generally discuss things that you touched on before or new business that you may want to touch on in the future, or maybe something came up yesterday – there was a newspaper article or an Opinion. But you want to keep that discussion very limited. And anything which is going to require a sense of deliberations or action, make sure that somebody says, "Well, let's put this on the agenda for next month," and then list it on the agenda for next month.

Let's talk about Executive Sessions. Have you ever had to go into an Executive Session?

Chairman Dean: Yes.

Ms. Kirk: For Executive Session the attorneys are well familiar with the reasons that you can go into Executive Session. There are a couple rules about that. You still want the item on the agenda. Not the expected decision, but the nature of the item to put the public on notice as to the general area being discussed. And then you do want somebody to make the motion to go into Executive Session. A bit of trivia that a lot of people don't realize is that the motion could fail. Sometimes when there are controversial issues I've seen – not very often – where a motion will fail because members of the governing body want it discussed out in the open. Rarely does it happen. A personnel exception is one where you can go into Executive Session. The attorney is normally going to tell you, "Look folks, if this motion fails and you start discussing this employment issue out in the open we are going to have other legal

problems to deal with – although the affected employee could ask for it to be out in the open.

When you are back in Executive Session make sure that you stay on point with the corresponding agenda item. So, if you're talking about 60-days, the financial implications, or a contract you are going to bid out and you don't want the competitors to know what you're looking at as far as the specs, at that point make sure you don't stray off to, "Oh, we want to hire a new so and so. What do you all think about that?" Because you told the public you are going back for one reason, you need to go ahead and stay on track for that reason.

At the end of your Power Point I have a couple of scenarios. I gave you the Power Point as a resource for you if you want to have it.

At your meetings do you ever have "public comment periods?" Now under the Open Meetings Act they are not required. The reasoning behind the Open Meetings Act is people get to have the opportunity to sit and watch you all engaged in governing. It doesn't confer a right to speak. Now other laws may. For example, ordinances or a law that says there has to be a "public comment" period. But the Open Meetings Act does not require it. We always encourage it. If you have a public comment period, you are welcome to impose reasonable limitations in regard to how long somebody speaks.

I just saw one court case that was sent to me today where there was a member of the audience who was out of order and kept saying, "I object. I object." And so eventually the Chair had a deputy remove him from the meeting for disturbing it. But actually as it moved up through the appeal process the Court found that indeed that he had him removed for violating the meeting process. It wasn't based on the speech. Because the last thing you ever want to do is cut somebody off based on speech. If they have three minutes to talk and two minutes into their dialogue they start talking about your performance, how they don't like it, for common sense reasons you don't want to say, "Okay, you don't get three minutes. You're done." You need to let them speak. But if somebody keeps speaking or they start using foul language, you have the right to control your meeting. If a meeting ever gets out of control for one reason or another you certainly can adjourn your meeting at any point. You don't need to feel like you need to run your agenda. Sometimes there is going to be too much on it anyway and you can revisit those items at a future meeting.

I am sure your minutes are fine, and that one of the staff members takes the lead on drafting them. In fact I see they are being tape recorded. If there are ever any questions, you've got the tape recorder.

I'll give you some scenarios, and based on what you've learned if you have any opinions. If you don't, maybe the audience will back you up.

Members of the Board, you call amongst yourselves to decide. And I'll pick an area. . .nothing to do with your business. If you're on a PSD and you want to decide whether a water line should be extended. Can you do that by just calling each other on the telephone?

Chairman Dean: I don't think so.

Ms. Kirk: No. You are right because it involves a quorum. The smaller Boards are more challenging. County Commissions you've got three. You guys have more. What is your total membership amount?

Chairman Dean: Five on the Council and five voting.

Ms. Kirk: Five voting. Okay, so you've got the quorum there, which I assume is three. And that doesn't mean that you can't have a conversation. You want to be careful because you're easily up to that quorum. But let's just say two of you always see each other and you talk about the business. You're fine because you are not a quorum. What you want to be careful about is that there's the other two that talk about business, and then there is a go-between person who relates positions on matters – that becomes a communication.

You can call each other to schedule a meeting. One thing I caution you about is that if you get the agenda or you call to schedule a meeting and you say, "Well, here's the reason for it," and it's some item that is controversial. You don't want to start debating on the phone when you're deciding to call the meeting if you should discuss that issue or which way you should go on that issue.

Mary Jane Pickens: I think Mr. Dissen had that question. The question. . .you could probably say it better – is when you come up with something that you might want on an agenda, how far can they go talking about just. . .

James Dissen: It comes up under the rules. . .Title 85 it says, "The meetings of the Council may be called by the Chairperson and the Chairperson shall call a meeting upon the request of at least three of the members of the Council." We already have a quorum – three. You're going to ask for a special meeting, and the three members are

going to have to discuss the reason for having a special meeting. Now does that violate the Open Meetings Act?

Ms. Kirk: I think the most conservative way to do that is to phrase in one line what the agenda item would be and say, "Are you agreeable for calling a meeting for this reason?" And read the agenda item, and that's it. Don't begin engaging in dialogue. "Well, no, because I don't feel strongly about that or I think it's controversial. I want a special meeting or I don't." A thumbs up or a thumbs down on it.

Mr. Dissen: You need case law to back that up. . .the position.

Ms. Kirk: No. Every lawyer hates to say that.

Mr. Dissen: But every lawyer likes to ask the question.

Ms. Kirk: What you could do is submit the question to the Open Meetings Committee and that would be a good area because I have gotten that question before.

Mr. Dissen: It seems to me that the two statutes are opposed to each other. If we say we can ask for a special meeting, logic would have to discuss, not the depth of it but the reason for it. Then come back and say, "Well you can't do that." Then we say, "Well then why even have that part of the statute if we can call a special meeting."

Ms. Kirk: And that's what is difficult about the Open Meetings Act. Sometimes there is not a black and white test. Like if somebody walked into a courthouse and two County Commissioners were there talking to a citizen, it doesn't mean a citizen can't say something to them. Let's say that they say one word about, "Well that's outrageous that they are coming to town to put up that factory." And then somebody says something back and then they quit and walk away. The Court is going to find you didn't go far enough to violate it. So the question you asked is a similar gray area where we could give you more definitive guidance. Like I said the most conservative thing is to. . .and the Chair, do you have the power to call a special meeting yourself and you don't?

Chairman Dean: We do.

Ms. Kirk: You do. That may be the most direct route if somebody has an item to direct it to the Chair.

Mr. Dissen: That's the process. Three people then would go to the Chair and say, "We want to have special meeting." The Chair will then call the meeting.

Ms. Kirk: Does he have the power without three people asking him as the Chair?

Ms. Pickens: I think so. The issue is how do they get their idea to him to. . .

Ms. Kirk: Oh, just one person can easily. . .because you're not a quorum, so one of you could easily call up the Chair and sell your story to him. You are one person and you don't constitute a quorum.

Mr. Dissen: Again, the statute says that a "Chairperson shall call a meeting upon the request of at least three of the members of the Council." So you need three Council members to request a meeting.

Ms. Kirk: I think he has discretion to call it and then the backup is. . .

Dan Marshall: Or not call it.

Ms. Kirk: Or not call it. When he doesn't call it, that's option number two. You say, "Well, I'm going to over vote you."

Mr. Dissen: He doesn't have the option not to call it if you have three members requesting it. The statute says, "Shall. . ."

Ms. Kirk: So that's option number two.

Mr. Dissen: I'll submit the question to the hotline and see what happens.

Ms. Kirk: Those are all fascinating questions that I do look forward to receiving.

Mr. Dissen: I'm going to ask that question of my class. . . ethics class. I am going to raise the question and see what the new generation thinks.

Ms. Kirk: It will be fascinating to see if there is actually a court case. I think I've covered many of the general areas under the Open Meetings Act, and given you a better feel of what are communications for purposes of the Act in regard to notices. Every meeting has to be noticed and the staff takes charge of getting it into the *State Register*. Are there any more questions?

Bill Chambers: Perhaps you touched on this and I just missed it. Would you go back and clarify if, for example, Jim comes to me and talks about an agenda item. Let's

have this on there. We talk about it some. And then later on I'll run into Kent at the mall and we talk about it. Have we just violated the Open Meetings Law? Three of us have talked about it, but not three at the same time in one group.

Ms. Kirk: I would exercise great care because that could be construed as a serial communication. He is saying, "If we're going to have an agenda item. . ." The most conservative thing is if you need the three votes is to write out or type out the proposed agenda item, and e-mail or do it in a letter form to the person: "I, as a member, seek to have a special meeting on this agenda item." Are you with me?

Mr. Chambers: Yes. I'm just thinking through the implication. And it seems like the implication is that we shouldn't discuss things outside these Open Meetings, and certainly if we have a discussion with one person that's on this Council then we should never discuss that outside of these meetings with anybody else.

Ms. Kirk: Yes, I think that's the most conservative approach. It's not always easy. Where if it's the City Council of 20 people, then it's a lot easier because they probably have eight or nine people that they can discuss or whatever. . .but with a smaller governing body it's not so easy. The Open Meetings Committee – the rules apply to subcommittees too. I don't know if you have any subcommittees.

Our phones are always open. Our advice is confidential. So anybody is welcome to call us, including anybody from the audience.

Chairman Dean: Very good. Thank you.

5. Update by the OIC

Mary Jane Pickens (General Counsel, OIC): Mr. Chambers asked that some items be put on the agenda. Essentially an update by the OIC of its view of how the workers' compensation system is functioning relative to where we were a year ago generally, and particularly with regard to issues that were discussed as part of the Rule 22 discussion, which was roughly a year ago. There are two sub bullets. I did try to touch base with you.

Mr. Chambers: Yes. I was unable to get back to you. I appreciate your call.

Ms. Pickens: First of all, are claimants being kept better informed of claim decisions and status of claims? The second sub bullet, have inappropriate denials of

medical treatment increased or decreased? Does the OIC believe the current level of inappropriate denials is acceptable? Are there significant differences in the numbers of denials by fund (Old Fund, private carriers and self-insured entities) or by provider? Do you want to add anything?

Mr. Chambers: I should have had the word "inappropriate" before "denials" on that third question. I thought a year ago the OIC made a pretty good case that there were parts of the system – even though the system is working much better – there was need for continued improvement. The proposed rules, at least I didn't feel, were quite targeted enough, but the underlying problems seem to me well presented by the OIC. Here we are a year later. Have the problems been addressed some other way? Have they been cured on the round or have they not? And if so that would then. . . what should we be doing about it?

Ms. Pickens: We track litigation trends all the time. And this point was brought up I think repeatedly when we were talking about Rule 22. We only know what gets protested. So there is a universe of issues out there, things that are happening, but unless somebody brings it to our attention we don't know about it. With that caveat, we do track the litigation trends, and Aaron Baughman is one of our analysts. We've asked him to be here today and he is here. He has a lot of charts and graphs that we handed out prior to the meeting. Since he is the data person, he would be the best person to go through this.

On the first sub bullet about claimants being kept better informed of decisions and status of claims, I don't know how we know that. All the carriers and TPA's are making their decisions. Now we do on occasion, if someone brings it to our attention, know that a carrier or a TPA had a deficient denial to a claim and it didn't have the right protest language. I think we're moving through some of those issues and it is a little better than it was, but that is occasionally brought to our attention. They will respond to a claim in some way that we don't think is really adequate, and we do contact the TPA and the carrier and point out their error and try to get them on the right track. But as far as whether they're being kept better informed, I don't know that we have any data that would support that or say anything about that particular issue.

Kent Hartsog: Mary Jane, has there been any change with regard to the number of complaints that have been filed within workers' compensation over the last like three or four years? Does it remain fairly static?

Ms. Pickens: My general understanding is that it has gone down. And I apologize because I asked for complaint data from our Consumer Services Division, but did not

get it before this meeting. I would be happy to bring that back at the next meeting. I just don't have it today. Again, the litigation statistics is what Aaron is going to go over. My belief just generally from working with our Consumer Services Division is that complaints are down.

Bill Kenny (Deputy Commissioner, OIC): Complaints will be down because we've directed more and more people away from them to the proper law, which is the Office of Judges. When we get a complaint here with our Consumer Services it doesn't stop the clock running. So a person, although they think they've lodged a complaint, they really haven't. They have to file the appeal.

Commissioner Jane Cline: We encourage them to file the appeal because that's an expedited process as compared to the normal complaint process. If somebody is complaining that a company is not fixing their roof, there is a longer period of time to work through that. Because you have the more expedited review at the Office of Judges we do try to encourage people to avail themselves to that.

Mr. Hartsog: So if I take those statistics, or that inference that you are making, along with Judge Roush's reports that we see, it looks like that actually the number of complaints filed has been trending downward over the last several years.

Ms. Pickens: When we say "complaint," we are speaking of a consumer complaint that is lodged with our Consumer Services Division, which has nothing to do with the Office of Judges, has nothing to do with litigation of the claim. When we get a complaint we make absolutely certain that the person filing [the claimant probably] that there is a period of time – 60 days to protest that – and they have got to file that protest or they will lose their right to get a legal determination of their issue. We can't do that in our Consumer Services Division. We are not a trier of fact. We can't give them a legal determination of their issue. Consumer complaints – when you get into the world of workers' compensation – are really more for trending and for looking at issues and seeing if there is anything out there that we just need as a regulator to look at. But as far as litigating an actual claim, a claimant needs to do that through the administrative litigation system.

Mr. Kenny: If somebody calls up and says, "I have a complaint." At that point they will be told that you've got to file your appeal. And then they may actually never file the complaint, which in our case requires a written document, signed, etc., or it does not get in the database. We don't track phone calls. So I guess what I'm trying to say is, we try directing them to the proper. . .

Commissioner Cline: It doesn't rise to the complaint issue unless it is the formal complaint.

Mr. Hartsog: In getting a decision made with regard to whether a medical treatment process or procedure is going to be approved or not approved and get that expedited as much as possible, I'm assuming that someone would if they can't get a written decision from the insurance company or TPA or whomever, that they would probably call your Consumer line and say, "I can't get these guys to give me a piece of paper so that I can go accept it or appeal it."

Ms. Pickens: Right. That is something that we're concerned about or have some jurisdiction over because we are the regulator. And if the TPA or the insurance company is not responding to claim applications or requests for treatment or whatever, that is something that as a regulator we could get involved in.

Mr. Hartsog: Is that something that you hear a lot of problems or calls into. . .?

Mr. Kenny: We don't have the information. That's what Mary Jane was saying. She doesn't have that information.

Ms. Pickens: I don't have the information on that.

Mr. Kenny: We would be speculating and I don't want to do that.

Mr. Hartsog: Okay.

Commissioner Cline: I think another point about this is – and we struggle with this – as much public outreach as we've done, there are people that do not know we exist. And there are people that do not know the services that we provide. And then there are people that we go to fairs and festivals and they say, "What kind of insurance are you selling?" So there are many people that don't understand that we are a resource for them. We know we don't get everything. We don't get everything whether it's a homeowner's complaint or a health insurance complaint.

Mr. Hartsog: How do we improve that?

Commissioner Cline: We welcome ideas. We struggle. We do fairs and festivals as much as we can to do outreach. But there are many people that just don't understand.

Mr. Kenny: We speak to groups. We do all kinds of things.

Commissioner Cline: We never turn down a Rotary or a Kiwanis Club. But, again, they can tell you that they get asked what kind of insurance do you sell.

Mr. Chambers: So it would seem to me then that we have to recognize that our responsibilities, among other things, is establish a moderate form of standards of measurements to ensure the timeliness and accuracy of activities performed under the Code. So we're saying that unless there is a complaint or an appeal or some process like that, we don't really know. And in fact many people who are in the process [as claimants] don't understand their rights. They're not well informed, and it's difficult to make them well informed. So given that, if all we're monitoring and measuring the system on is a complaint based process, it seems to me our approach is inherently flawed and inherently incomplete. We need to strive to find some way to reach deeper than that to understand this. And I would just say, for example, and I haven't thought it through – my senses in the medical world – there is an ongoing process of sampling, whether its questionnaires or something of claimants involved in the system to try to extract meaningful statistics that way as opposed to anecdotal stories about problems and statistics only based upon complaint. I think it indicates we have a need among us all to dig deeper.

Dr. James Becker (Medical Director, OIC): I have a couple of comments. I think that Mary Jane has correctly reflected the activity that is going on, as we've been keeping an eye on the progress with workers' compensation. The challenge from the medical perspective has been the large number of medical providers participating in our state, and keeping them informed about workers' compensation – how workers' compensation is operating in West Virginia. We have been participating and offering to participate in training for them. Not too long ago I did training for Traveler's, Broadspire, Avizent and some of the carriers that are writing in the state. With the upcoming Workers' Compensation Education Program in May that will attract maybe 150 participants. And that's the second year that we've done that. Our outreach is primarily to the providers and carriers, and that's the effort that we're making.

I agree with Mr. Chambers that collecting more data about how effectively we are reaching out to the injured worker and to the providers probably is an important piece of what do. I think that it may not be our direct charge, and that's the thing we might want to talk about.

In terms of complaints, the primary complaints that come to my office [here] would be complaints from providers confused about the status of a claim, where to submit the

bills or where to request authorization. That communication piece of it is a bit of a challenge with as many players as we have. In talking to other states, many states don't have this many carriers participating. We've been really successful with privatization, but we do have carriers who are out of the state and I think that's one thing that we have to be aware of. So we're prepared to keep offering ongoing training for them to make sure they understand the requirements of Rule 20 – Rule 20 as it relates to independent medical examiners; Rule 20 as it affects PPD; and then try to keep them informed of changes like the recent Supreme Court decision. I wanted to offer that here. I think it is a challenge and I'm glad Mr. Chambers brought the issue up. Thank you.

Ms. Pickens: Are we ready to move on to Aaron and his discussion?

Mr. Hartsog: Well, just to recap. Where are we heading on the meeting with regard to this topic? How do we go about addressing it? Expanding on maybe what Dr. Becker is saying they're doing. Is there a benefit to how to . . . compel or to provide training to insurance companies that may not be as familiar with West Virginia statute and the rules?

Ms. Pickens: I think that's something that should always be on our minds, and if you want us to give it some more thought and talk about it and have it as another agenda item. . . I mean, again, I think we do quite a bit of outreach actually. We do have the Annual Workers' Compensation Educational Conference, which a day and a half event. We speak to lots of groups.

Commissioner Cline: We have specific Webinars directed to that. . . training for adjusters with West Virginia law. . .

Ms. Pickens: That was primarily surrounding the opening of the competitive market in the years of 2009 and 2008. We did a lot of Webinars. We did probably three or four different large adjustor meetings where we had 200 people come in for each meeting. And there was a lot of outreach at that time because it was the beginning of a competitive market. We knew we had new carriers coming in and new TPA's. It was very aggressive. Honestly, that takes a lot of resources. Just getting ready for the meeting coming up on May 3 and 4, it takes a lot of time to prepare for those things. Not that that's a bad thing – but just so you know it does take resources to do big events like that. We are always willing to talk about ways that we can reach out. Like the Commissioner said, we're always looking for fairs and festivals and different ways to get out among the people and make sure that they know we are here.

Commissioner Cline: I think, for example, Judge Roush sometimes is able to identify through the litigation that there is a company that is having an adjustor problem. Then we are able to reach out to them and work to correct that. They assist us through that process. If there are a certain number of inquiries about the same issue for the same company, then our Consumer Complaints will bring that to our attention and we can address and outreach to that company to work through that.

I think another challenge with this whole thing is how to get at the people that don't ever come to us. How do you identify those people and reach and survey, which gets to the challenge of trying to get what the actual numbers are.

Mr. Chambers: Some way to measure results.

Commissioner Cline: Right. How do we know where they are is the challenge we have. Now we can find some things in looking through market conduct of companies on their denials. But that still isn't going to get at the people that don't ever file a claim because they don't know the process or they are discouraged from doing it. Sometimes the ACT Foundation will bring to us an employee that has been discouraged from filing the claim. We have that kind of an issue going on too. They help us identify these.

Ms. Pickens: To get back to your question, I don't know that we have a solution today. But I think it is a good question.

Commissioner Cline: We are willing to, obviously, brainstorm and try to think of ways. We do this all the time. It's like how do we know what we don't know? How do we get at what we don't know?

Mr. Hartsog: Well, I wasn't necessarily looking for a solution. I was looking for let's having a dialogue on how to maybe do it somewhat better because there's a couple of things I think that we can do in the process – look at if there is rule making necessary to improve the process. And also holding hands with that is getting the process expedited as much as we can so people could get treatment decisions and get appeals done and move on and not languish for months waiting for someone to make a decision or somebody to get them a piece a paper or something either for the company or for the claimant. If there is a better way or if we need to have some public input and have some people that have some ideas come up and give us those ideas. I'm all for it, if that would be appropriate.

Commissioner Cline: Well, I think Dr. Becker will tell you that the sooner you are getting the appropriate treatment the better opportunity for a good outcome.

Mr. Hartsog: A good outcome. Absolutely. And I think that's what should drive our. . .

Commissioner Cline: Which ultimately lowers the costs. You may spend more on the front end, but you get a much better result for the injured worker and their family.

Mr. Chambers: I have questions, not answers. I wonder, for example, can we go to a provider or all the providers and say, "Give us a list of every claimant who has an open claim right now and we are going to survey a statistically reasonable sample of those with a questionnaire or something to find out how they feel and how aware they are and how successful our efforts have been." I don't know if that's the right to do or not, but to me that would be one thing to consider. And as far as process, I think Commissioner Cline used the word that I would use, "brainstorming." I mean, in private business what we would do next at some point is we get our questions together and we would have a strategic planning process where we have opportunity to brainstorm, think outside the box, ask other stakeholders to provide their ideas, and develop strategies, goals, tactics and measurements to see how we're doing on our goals and objectives. That's how businesses run. At least the businesses I've been involved with have been successful. They're not all run that way, but the ones that are successful tend to be that way. And I don't know if that's been done before my term on here, but I guess that's kind of where I'm headed with all of these questions. Especially in light of the Open Meetings rules, these are not the things we are going to sit around and come up with ideas, and should not, outside open discussion.

Commissioner Cline: To your point, we obviously do a lot of discussion and brainstorming among ourselves. We were working towards getting the market open. We've gotten the market open. This is going to be a continuing process and continuing to look at ways to improve upon the entire system for the benefit of the claimants and the employer community. It all has to very much work together. We also participate in the IAIABC, which is another acronym for you, which is the International Association of Industrial Accident Boards and Commissions. We are able to get some good information and assistance. So we do reach out to other states in looking at their processes and how they monitor.

Ms. Pickens: The NAIC also has a joint NAIC/IAIABC taskforce that we're on. And so every time we go to the NAIC we go to those meetings. I mean, it is interesting because West Virginia is not alone in issues that it faces in workers' compensation. Every time you go to NAIC the workers' compensation meetings are typically about issues that we struggle with here as well.

Commissioner Cline: And we've been ahead on some of them, like the volunteer firemen. That's a forum too for us to put forward – some questions and get some insight about perhaps how other states are looking at monitoring.

Ms. Pickens: And that actually would be what I would do next, to talk to other states. State regulators communicate quite a bit with one another, particularly insurance departments. I would be happy to take the next few weeks and see what, if anything, I could find about what initiatives other states might have done along the lines of what you were talking about. I don't know if anyone else has ever tried that or not.

Commissioner Cline: That's one of the things that through some of this discussion we have struggled with. How do we know what we don't know? How do we get at those people that have been lost in the system and never knew where to go, never had the support of an HR Department guiding them? So, consequently they just ultimately fell through the cracks, which is not the goal of any of us. It is to get them taken care of.

Mr. Chambers: As the Commissioner said, it should be viewed within the context of "it's come a long, long way and it's working well," but we always have to strive to be getting better. And I think when we talk about trends, I think we'll see that we've been in a little bit of a period with the down economy and everything where it was a good time for workers' comp, but those days are about to change with medical costs continuing to rise and other things. The pressure will, I believe, continue to increase upon us going forward. And if we're ahead of the game rather than behind the game, as you've been so far, we will better serve all of our citizens.

Commissioner Cline: Well, in a workers' comp claim healthcare trends up. Workers' comp claims are more expensive than a regular healthcare claim. You enter with a broken arm, but you fell off the ladder versus you enter with a broken arm from a work related injury. The cost of the work related injury is at a more aggressive treatment process plus a more costly claim.

Chairman Dean: Mary Jane, are you going to try to collect some information from other states?

Ms. Pickens: Let me see what I can come up with.

Commissioner Cline: We'll talk to our Market Conduct staff and see if they have some thoughts on this.

Chairman Dean: At the next meeting we could see what you've come up with and then we can decide whether we want. . .these guys are dying to brainstorm. Mr. Marshall, do you have a comment?

Mr. Marshall: I realize that we have sort of a data deficit here. As the Commissioner said, "We don't know what we don't know." But we do have certain objective data on these carriers and TPA's. It appears from what I've heard that there is some measurable quantitative difference in the services being rendered by some of them. And some reference was made particularly to numbers of – probably relatively small – out of state carriers. I would be very interested in knowing what action either this body can take through the implementation of rules, or what the Insurance Commission can do as the regulator to bring those, let's say, deficient players up to the standard that we expect. And if you could speak to that either now or at the subsequent meeting, I think it would be helpful to all of us to hear that.

Ms. Pickens: We have a lot of contact directly with carriers and TPA's when an issue comes to our attention that could be resolved through a less formal process as opposed to actually litigating the merits of the claim or the merits of the decision before the Office of Judges, Board of Review and the Supreme Court. We get from the Office of Judges – people don't use this very often but I think its part of Judge Roush's report – the failure to timely act issues. Is that right?

Judge Roush: Yes. It is on the last page.

Ms. Pickens: A claimant can file a complaint with the Office of Judges when the allegation is that the carrier or the TPA did not act in a timely fashion on certain issues. They will hear those matters and make recommendations to the Insurance Commissioner on what we should we do. They are sitting as a Hearing Examiner, and it is ultimately the Insurance Commissioner's decision. We consider that to be sort of along the lines of market analysis – like a consumer complaint. It is just handled a little differently. And what we would do is take the recommendations, just like we would a consumer complaint, and we would trend those. If all of a sudden you see a cluster of these types of issues surrounding a particular carrier, you get in touch in with that carrier. Market conduct – and this is the same way in all states – has undergone a lot of changes in the last several years, five to ten years. There is a desire for consistency around the country with these issues. There is really a – what's referred to as a "continuum of responses" from the regulator – starting from the smallest type of action or reaction by the regulator which may be a phone call or a letter, on up the scale. The worst thing you can do, which is revoking or suspending a license saying you just can't do business, and then a number of things in between.

Mr. Marshall: I think what I would like to know is, you speak of that "continuum of action." I would like to know timeframes and basically just how aggressive or non-aggressive the OIC is in monitoring this particular area because I think it's one that needs attention. You may not have the tools that you need either legally or from a standpoint of resources to do what you would like to do in that area. You may need an expansion of your powers or possibly – and this something I don't know – is this an area within our jurisdiction where we could promulgate certain regulations that would give you some tools to be more effective in that area? I think as the regulator you have a lot of flexibility. From my standpoint, if there is a carrier out there who is just being cavalier because they're trying to hold their expenses down – and we all understand that it's great to hold these premium dollars rather than put them out on claims – something needs to be done about that. They need more than a contact. They need to know that there is a hand out there; number one, watching them, and number two, ready to act when appropriate and after due process.

Commissioner Cline: We have tools. We can take administrative action. We can fine and penalize. And companies don't want to be fined or penalized because then that goes on their report card and that is shared throughout the country. They don't want to be found in noncompliance.

Mr. Marshall: Can you give some data on what you are doing, have done, or intend to do just in the area of workers' comp?

Ms. Pickens: We can do that. I think we just want to make sure. . .I mean that really is the insurance regulator's activities. You had mentioned is that within the jurisdiction of this Council. I don't think it is as far as regulating insurance companies.

Mr. Marshall: I think it is appropriate for us to inquire and receive answers as to what your policies and practices are and the results you've obtained in implementing those policies and practices.

Ms. Pickens: Yes, to the extent that it relates to what this Council does. And what the Council does is make sure that the rules implement the statutes as far as what a carrier has to do.

Mr. Marshall: Exactly.

Ms. Pickens: How quickly they have to do it. How they have to respond to certain things. How they make sure that benefits are being paid properly.

Mr. Marshall: These remarks that I'm making are in no way, in any way, or any sense to be criticism of any action that you all have taken. I'm just interested to know what action you are taking and how these companies are being regulated and to what degree. When you do see problems – even though you see problems through a lense that doesn't have a perfect prism – how aggressive are you and what responses do you get? Do you think the responses you're getting are appropriate for these carriers? They are licensed to do business in West Virginia. They do have an obligation that goes with that license. You do have companies who are by and large complying. And, frankly, a disservice is done to those compliant carriers when you have these outliers out here. So there are a whole lot of reasons why I think it is relevant that we just have that information, and that the public has that information.

Chairman Dean: Any other questions on this matter? If not, we'll go onto Aaron.

Mr. Dissen: Not to make light of it, but in listening to the comments reminds me of a press conference that former Secretary Rumsfeld was in. They asked him to identify the intelligence of the enemy and he said, "There were certain knowns and unknowns. We know the knowns. We also know the unknowns that we know." So, I feel comfortable that Mary Jane would identify the "unknowns that we know" and come back so we know.

Aaron Baughman: I was asked to come and go over some of these protests. They all come from Judge Roush's database. Starting with the first page, looking back we're a long way from where we used to be. We've mapped out several different major types of protests. These are all Old Fund. If you skip a page, looking at the self-insureds, those are down. Those started in mid 2004. Not down as dramatically as we were in the Old Fund. Skip two more pages and we go to the private market which is relatively flat for the past three years, but down from where they were in the beginning. The total protests – skip two more pages – you can see that the total protests are way down from where they were, and I guess you probably would have gotten that same information from looking at Judge Roush's reports. Skip a couple more pages and we'll look at where there Old Fund was as of February. I guess one of the major concerns that I was asked to look at was the medical treatment/equipment of claims by the claimants. You can see those are fairly sizable. If you go to the page beyond that you will see where it was five years ago. Treatment/equipment medical protests are in red. Five years ago there was a significantly smaller portion of the total.

Ms. Pickens: Aaron and I talked about this earlier. Do you have an explanation why there is some shifting around on these?

Mr. Baughman: Because the Old Fund is one where I would call a closed book – no or fairly few claims coming into it because it stopped because of the liability. All your other pieces are getting smaller, but everybody is going to have medical. Everybody who has a claim has a medical dip into it whether it's the medical only or medical and indemnity. You are going to have fewer people who have dependents. . .so many for permanent partial disability, temporary total disability. So that's the other pieces of the pie. The medical treatment/equipment appears to be larger, but all you can see from the first pages it is still going down. It is just not going down as a quicker rate as some of the others. You have the same looks on the self-insured. It's a little bit bigger than it was five years ago in the private market. It was about the same as it was. The Old Fund workers' comp treatment/equipment protests by claimants, you can see those are down.

Mr. Hartsog: Are these pie charts number of claims or percentage of dollars?

Ms. Pickens: Number of protests.

Mr. Hartsog: Number of protests. . .?

Ms. Pickens: Those are all different issues within a claim.

Mr. Baughman: The Old Fund is down from a high of 2004–2005. It's running about 500 now. On the next page the self-insured is down from a high of 2005. The private market is up slightly from 2009. As you can see from the pie charts they were at a relatively stable percentage in the private market, between where we are now and where we were five years ago.

I don't know how much more you would like for me to go over. I've got a hundred different looks at this thing. Basically, the short answer is just about all of the protests coming in are down, especially when you look back about 10 years. Medical treatment/equipment of claims seems to be up relative to the total, but they're still going down overall, just not as fast as some of the ones in the Old Fund.

Chairman Dean: Mr. Hartsog, do you have a question?

Mr. Hartsog: Yes. When you look at all of this information, and obviously we haven't had a lot of time with it here, but is there anything that you conclude or see as a developing trend among the data in any particular area that you're seeing?

Mr. Baughman: The protests in total are down. That's an easy one, especially for the past decade.

Mr. Hartsog: Is there any particular area where you see anything or an issue or anything gaining traction or increasing or is it just. . .is everything continuing just to trend down?

Mr. Baughman: By and large everything is trending. . .

Mr. Hartsog: Okay.

Chairman Dean: Mr. Dissen, do you have any questions?

Mr. Dissen: No, sir.

Chairman Dean: Mr. Chambers?

Mr. Chambers: No, sir.

Chairman Dean: Mr. Marshall?

Mr. Marshall: No, Mr. Chairman.

Chairman Dean: Very good. Thank you, sir.

Commissioner Cline: I would offer that Aaron will have that put on the web page for those people that would be interested in that.

Judge Roush: Mr. Chairman, I have some complimentary data that I prepared which I think may be somewhat helpful to you. [Judge Roush passed out an additional report to the Council members.]

Commissioner Cline: Again, we can put Judge Roush's report on the web page as well.

Judge Roush: What I wanted to show you was a comparison of the statistics – first of all between March of last year and March of this year. The first pages of the protests pending – you can see that it remains relatively the same, just a small drop. In 2010 we had 3,839 protests pending in March. This March we had 3,593. With regard to medical treatment, you'll see that the treatment protests went up slightly. In March of

2010 we had 634 and in March of 2011 we had 782. The second page is how that breaks down on a pie graph, and it does remain substantially the same with very little change. What I wanted to point out most importantly, and offer it as a complimentary to the publication that Aaron just gave you, I have a whole section here on medical treatment benefits in the back. It starts on page five. And that's the standard of course which we review medical treatment found in the statute, Chapter 23. You can see the total treatment protests have substantially declined between 2005 and 2010 with a slight increase this year. And this is how it breaks down by carrier on page eight. Private carriers. . . we're seeing more protests from that category. This bar graph shows that we do have more this March than we did March of 2010.

Most importantly are the resolutions of those protests, and that's what I think is most important for you know. How did that fare in our office with regard to the protests that came before us? How did we actually decide the issue? These are the comparisons between 2009 and 2010. You can see that we actually reversed less this year than we reversed last year, and that remains true with most of the sub-categories – the Old Fund, the private carriers. The only change we've seen was with the self-insured employers, which was a *de minimis* change, but we have seen a slight increase in the number of reversals with that carrier type. So overall we see that we're actually reversing less carrier orders with regard to medical treatment. I just offered that to you for what it's worth.

Ms. Pickens: To get back to the agenda, one of the questions, "Does the OIC believe the current level of inappropriate denials is acceptable?" We don't think any inappropriate denial is acceptable. The issue is how you get the best decision as possible in the claims. We've always thought that one bad decision is a bad decision because it is not just driven by numbers. There is some quality to the decisions. You could have a claimant where a bad decision early on in the claim is really detrimental to that claimant, and cause the claim to be very costly as opposed to another claimant where a bad decision is "a bad decision," but maybe it's not quite as detrimental. We've never felt that this issue – even though we do a lot of talking about trends and numbers – we don't think that it's driven solely by the numbers. You have to think about what's the goal and how do you achieve it in a way that has a balanced approach and doesn't overly burden the carrier or the TPA on the one hand, and still is something that should be the goal for the claimant on the other hand. And that was our intent, and our belief when we brought Rule 22. We were happy to put this back on the agenda. We think it's a good idea to keep talking about that.

Mr. Chambers: The current level. . . appropriate. . . denials isn't acceptable because we always want to always be getting better. So the next question is, do you

believe now that you have everything you need to make as much progress on reducing the number of inappropriate denials? Or do you believe there are actions that the Industrial Council ought to take to help move toward a lower more acceptable number?

Ms. Pickens: We still believe in the Rule 22 effort that we had last year. There was more debate honestly on that rule than I think I've been involved in even with some rules that go to the Legislature. There was a lot of debate on that rule. I think we still stand behind it. That would be the type of thing. . .if we felt that we, as the regulator, needed more tools it would be along those lines. As far as our general Chapter 33 Insurance Authority, I think the Commissioner would say that we have a lot of those tools, and we are aggressive, and we are following up on all of the things as an insurance regulator that we ought to be doing. But I think as far as the Industrial Council is concerned our Rule 22 proposal would be the type of thing that we would propose at the appropriate time. We've talked about Return-to-Work and some other things that we think are probably good things for the Industrial Council to consider, which would add more standards for us to measure companies and TPA's by. When we go out and do a market conduct then we would have a standard to measure.

To sum it up and to make sure I know what I'm supposed to do, I'm going to take a look at – I'll get the Consumer Services data and I'm also going to take a look at whatever ideas we might come up with on ways to get at what we don't know, whether it be by survey or by. . .

Commissioner Cline: I like Mr. Dissen's. . .

Ms. Pickens: We've talked generally around a lot of your topics. I'm not sure that we covered them all so I'll leave that to you.

Mr. Chambers: I mean to me. . .what I guess I comprehend, and I look forward to digging into these statistics more in trying to analyze them a little bit, but we need to know more about how the system is performing other than just relying on complaints and appeals, and that there is the need to continue to improve the system.

Chairman Dean: I think we all agree on that.

Ed Watson: Could I ask a question?

Chairman Dean: Ed, could you hang on until we go to public comments, and I'll let you comment as much as you want.

Mr. Watson: Okay.

Chairman Dean: Thank you, sir. So five. . .is everybody satisfied with five? We've had a thorough discussion here.

Mr. Chambers: . . .haven't talked about trends other than just briefly mentioning them. As the Commissioner said, medical costs are going to go up, telecommuting and everything. And the economy is making it more challenging to have meaningful return-to-work programs. So the challenge is to maintain a quality system of good care and at reasonable costs is going to get more challenging as we go forward. And we ought to be maybe looking a little more and anticipating those trends, or understanding what the Commission does in anticipating those trends and preparing to deal with them as early as possible as those things comes forth.

Commissioner Cline: NCCI, which is our statistical agent, and statistical agent for 38 states, will be having their annual symposium at the end of next week and we will have staff there. They do a trend of what they are seeing as far as the medical inflation, their actuary, and all of those kinds of things. We could probably get someone from NCCI to come in and present to you what is going on in the current marketplace. They are always very responsive and cooperative.

Ms. Pickens: I am sure we can do that. And also in September they go around all the different states and they have sort of a half-day type meeting, that really the Industrial Council ought to attend.

Commissioner Cline: And that may be the other opportunity in early September. They will be doing that at the end of this month. Dennis Kokulak has been doing some work with us and is in and out, so we could see about the next meeting.

Mr. Chambers: There was one other detail. . .Again, I know we have to be careful about anecdotal stuff, but I've had a couple of people tell me that the reinstatement process is really easy and all you have to do is make a token effort to get reinstated. If you are an employer who has not complied with the rules and that there are still ways to get around that. I don't know what you all look at there or where we might want to go with that. I'm just curious how you monitor the reinstatement process when an employer has been reinstated or they roll into a new company. And I guess this goes to my accounting business. I had a guy tell me, "Well, we'll form a new company and we'll make the first payment and then we get another year and they won't even know the difference." We chose not to work with that client. I don't know what goes on there. I just hear anecdotal stories about that.

Ms. Pickens: It should not work that way. Now you have to buy an insurance policy and you have to pay a premium for however long you are going to be covered, and if you don't pay your premium it will be cancelled. When it's cancelled the carrier has by law to report that to us and we have a system that tracks people coming into and out of coverage, and we will fine the employer when we find that they. . .

Mr. Chambers: Maybe I need to nose around a little bit more and find out if my sources or what I'm hearing. . .and then maybe let you know what I'm hearing.

Commissioner Cline: And we could clearly have Debbie Tincher do a brief overview of what they do – what Employer Compliance does, proof of coverage system, and what Revenue Recovery does because they work hand in hand. The penalties are collected by Revenue Recovery. There is one aspect. You do want to get them reinstated and you want get them that reinstatement done in a painless manner, but at the same time we do give them a fine. We want them covered because we don't want any claims sitting in the Uninsured Fund.

Mr. Chambers: Sure. Absolutely.

Commissioner Cline: Because that puts a different burden on everybody that's doing the right thing, even though we can go after them.

Mr. Chambers: I'll nose around a little bit more.

Commissioner Cline: Okay.

Mr. Chambers: Mr. Chairman, I guess the last thing that I had requested that we have on the agenda is should there be a more formal process for this group to assess its performance in satisfying its responsibilities of developing goals, etc.? I struggle with this format of meeting once a month and sometimes once every two or three months to make a whole lot of progress on these things. So I just ask the question, should we be doing more some way to our responsibilities? I'm not particularly volunteering for an all day brainstorming session. My brain probably doesn't qualify for an all day session. I just worry that we've got some significant issues that we need to deal with, and being not a professional on this there is obviously a learning curve that's difficult to keep all of this in your head. We get massive amounts of information that is a little bit hard to process. I mean it's what we have to go through. I just question if we shouldn't be doing something to be more effective in laying out our goals.

Ms. Pickens: You know we've spent time talking about what the Industrial Council does. I don't know that we've spent much time talking to you all about what we do, and I don't think it would hurt to do this. I don't know how much it would help, but we would be happy, as the Commissioner just said as far as bringing in Employer Coverage and Revenue Recovery, maybe it would be helpful for the Industrial Council to hear presentations from the different divisions in our office to better understand what we do.

Commissioner Cline: Right. You probably don't know that when we receive notification that somebody has failed to pay their premium the actions that take place. We notify that person; we send an investigator out to investigate; are they still in business; we post their business; we start taking action to enjoin them in Circuit Court; we contact other state agencies that have licensing authority with them. We have all of these processes in place, and perhaps get a better understanding of everything that is going on. And to the other point, if there are particular issues; for example, we've heard from Executive Director Theresa Kirk on the Open Meetings Law. But I don't think that would prohibit us from having subcommittees that would meet and do more detailed work and come back to the full membership with recommendations where you would have a member of the Industrial Council, public interests, and stakeholders involved in doing research on certain aspects that you may have a strong interest in. We are open to those kinds of issues as well.

Mr. Chambers: I'm just curious how the other members of the Industrial Council feel about our processes and whether we need some process more formal. If I'm the only one that thinks that then we can take that off the list and I'll shut that topic up.

Chairman Dean: Mr. Dissen, would you like to comment?

Mr. Dissen: When we were asked to serve on these types of boards/councils my first question is, "What's my authority?" I think I said from one of the first meetings it seems to me in some areas I think there is an apparent conflict, but we've haven't got there. We'll work through that. We're not to rubber stamp things here. And if we're actually going to be checking over and monitoring, reasonable people are going to disagree on certain issues. I think I'm still not clear just what authority does this Council have. I would like to get that cleared up to see if I agree or disagree.

Chairman Dean: Mr. Hartsog, do you have an opinion?

Mr. Hartsog: Sure. I would like to get at whether it's formal or informal more with regard to how to make the process work faster and better for the claimant and the company. . .period. And, you know, if that's through statistics or trends or complaints or

whatever I have you to continue to do based upon my reading of what the statute says and what I see as the Industrial Council is supposed to provide independent oversight with regard to Chapter 23 and the processes within Chapter 23. And if that involves rulemaking, fine, or if it involves talking about what we could do or what the OIC could do that's how I view what we should be doing. That's kind of what my first objective would be with regard to whether it's formal or informal definition process. That's kind of how I've looked at it.

Chairman Dean: Mr. Marshall, do you have a comment?

Mr. Marshall: I generally agree with what Mr. Dissen and Mr. Hartsog said. I'll put it into my words. I would like to see, based on the statute that created the Industrial Council, some clearer definition or delineation of exactly how we should exercise our duties and responsibilities. And I'd certainly welcome, Mary Jane, your views on that. I'm wondering giving the inherent. . . I don't want to say conflict, but the difference in duties and responsibilities of the OIC and this Council, if perhaps we shouldn't seek some guidance from some third party counsel. I'm not sure that's warranted, but I want to put that out there possibly for future discussion.

One other comment, I would certainly welcome a hearing from your operating divisions, Commissioner. I think we, all of us here, need to have a better understanding of what's going on. There is probably a lot going on in the OIC that actually makes this whole system work maybe even better than we might think its working. And I think it would be helpful to get some insight into actually how you go about your regulatory practices, with regard to particularly workers' comp. So if you put those folks on the agenda here, I'd certainly welcome it.

Chairman Dean: We are all in agreement. Mr. Chambers, is there anything else you would like to bring up before we move on?

Mr. Chambers: No, sir.

Chairman Dean: Very good, sir.

6. General Public Comments

Chairman Dean: We'll move onto general public comments. Ed, do you still have a comment for us?

Ed Watson: I really have a question. This is purely ignorance on my part. The I-Comp system. . .when are insurers required to actually report the claim? What timeframe do they have? Is there a timeframe for that to be reported?

Ms. Pickens: I don't have those rules in front of me. I think employers are supposed to report claims within five days. It is not I-Comp. Our Claims Index is the database.

Mr. Watson: Well, that's how I look at it. It's I-Comp or however you all look it. What occurred to me in listening to this conversation about "we don't know what we don't know," is when Dr. Becker's office gets a complaint from a vendor or Judge Roush gets a protest or a request for "failure to act" sort of thing, or there is a consumer complaint filed, I don't know what does or does not happen with those things per se. But I wonder if looking at the, what I call "I-Comp" or whatever you called it, to make sure that insurance company has filed a report. . .with the Insurance Commission. If you find that that particular insurer has not done that, that's a flag that may possibly find an outlier that's not doing. . .other things they ought not be doing too.

Ms. Pickens: That's a good point. In fact I was talking with one of the OIC people this morning about self-insured employers and whether those claims are being reported timely into the Claims Index. That very issue came up. We do track that. If we find out that claims aren't being reported timely we do follow up on that. There is a penalty associated with that.

Mr. Watson: It just seemed to me if you're looking for trends that you see somebody doing. . .maybe two bad things.

Commissioner Cline: Right. That is a tool. But I think it still gets back to our challenge when the individual has been discouraged from filing the claim. We get anecdotal about it, and sometimes there is enough information that we can actually get to the claimant and have dialogue and. . .

Mr. Watson: If a claimant is not going to file a claim. . .

Commissioner Cline: That's the missing link we have.

Mr. Watson: And I'm not sure how you get to it. . .something anyone can do about it. Unless you find your outliers and get them out of the picture, that might solve some problems.

Commissioner Cline: If it is the employer that's doing it. . .

Mr. Watson: And it could be so subtle. . .

Commissioner Cline: But there is still limited ability to get at that.

Chairman Dean: Thank you. Ms. Oxley, do you have a comment?

Sally Oxley (WV Physical Therapy Association): Commissioner Cline, Mr. Chairman and Council, thank you for having me today. My name is Sally Oxley and I'm representing the West Virginia Physical Therapy Association. I've been a practicing physical therapist for 35 years in Huntington, and my company provides services to injured workers – physical therapy, functional capacity evaluations. Our mission has always been to resolve a case quickly and get a claimant back to work. And it has been easier in the past because we've local case managers and vocational rehab specialists that work with providers, claimants and employers. We work very well together. We have the same mission.

Since the market opened in 2008 things have changed. We have a lot of companies coming in from outside the state, and they are not adhering to Rule 20. So the rules have changed. We may have an employer that's represented by two or three companies, all of whom have different guidelines to go by. Even within a company it depends on who you are talking to. So it's been very confusing for us. What we see is a lack of active case management in these companies, and also delayed authorizations for injured workers of processes that doctors have ordered. And we've also had issues with reimbursement, but that's not the biggest problem. The problem that we see is the system that had worked so well for us before is broken, and it is painful to watch. So anything you can do to make sure that these companies adhere to Rule 20 we would appreciate.

Mr. Hartsog: I'm confused. What changed between 2007 and 2008?

Ms. Oxley: The market opened and we have companies. . .

Mr. Hartsog: The market opened. . .in what 2005?

Commissioner Cline: The actual complete opening of the market was July of 2008.

Ms. Oxley: Prior to that it was just BrickStreet. It was private. Any questions from anybody?

Chairman Dean: Mr. Chambers, do you have a question?

Mr. Chambers: When you've had these problems have you taken any of these to the Office of the Insurance Commissioner's market conduct?

Ms. Oxley: Yes.

Mr. Chambers: Have they not been able to properly address the issues in your view?

Ms. Oxley: Well, the response that we received was that they were not – under their jurisdiction – was not reimbursement issues. But that really is not our primary issue. I mean we have a company that refers us to an answering system in the Philippines. So if we have a problem called "Philippines," we call them and they say, "We're not able to give you any information, but we will take your message and pass it on." And, of course, we hear nothing. We have a claimant that has been off work with a wrist sprain for a year. She's had no active case management. No one has ever gone to the doctor with her or talked to the employer about a job description or return-to-work. I don't know if the company has realized how much this is costing them down the line, but it truly is.

Chairman Dean: Mr. Dissen, do you have a question?

Mr. Dissen: No, sir.

Ms. Oxley: If you want to know problems in the system, I can give you names of companies.

Chairman Dean: Mr. Hartsog, do you have any questions?

Mr. Hartsog: No.

Chairman Dean: Mr. Marshall?

Mr. Marshall: I don't have any questions. I appreciate the information and I would urge you on your last statement there if you could provide additional data. I would urge you to provide that to the OIC for what action they may deem appropriate as far as the conduct of the carriers.

Ms. Oxley: We would be happy to do that, and one more thing I'll add. A fellow called me the other day [a physical therapist], and said that the authorizations he is getting are dated so you have span of care between maybe six weeks, and he will get it a week before it is to expire. So then you have to go back through the system again. It just really slows down progress. And I agree with Dr. Becker – the earlier you get these people into the system and get their minds set to go back to work, the more successful we are.

Chairman Dean: Is there anybody else from the public that would like to make a comment today?

Commissioner Cline: Dr. Becker would like to comment.

Dr. James Becker: Could I make one comment regarding Ms. Oxley's comments?

Chairman Dean: Sure.

Dr. Becker: We understand too the difficulty of enforcing compliance with the Rule 20 guidelines regarding treatment. It's only within the past six or eight months that we've been able to incorporate the Rule 20 check list into the field audits that we plan to conduct, and are currently conducting with those carriers. As the field audit teams go out, what they've done is they've identified the parts of Rule 20, including physical medicine guidelines and timelines. They are supposed to be checked off as being compliant for those carriers. But I think it is very early in that process from what's been done here at the Insurance Commission. That has been our first sort of "test" of the carriers' compliance with Rule 20, so that's coming along.

Chairman Dean: Is there another gentleman who would like to make a comment?

Mick Bates (WV Physical Association): I am a physical therapist also. I'm actually here from the universe that you don't know. You talk about the universe you do know. I practice in Beckley, and I see people from the first day they're hurt, all the way through process. They file a temporary total disability claim. The system has gone through a number of drastic changes. Overall those changes are good, and I was very involved in aspects of that change, and I could go around the state and talk to employee groups through the Chamber of Commerce or association groups. And like I said, these changes were good. Because of what we went through you are better off being an injured worker in West Virginia. You are better off being an employer because of the changes that we went through. That pendulum has now swung through and out the other side. And the issue we have. . .and the Insurance Commission has done an

amicable job in trying to manage the complexity of this problem. It was given to them and said, "Here you go. Regulate it. Take care of it." And then you've been charged with overseeing it. It is a complex problem. And having worked in two countries and seven different states, I can tell you that no state does it well. Some states do it better than others. West Virginia is probably a little bit better than the majority. But we have some real issues that need to be addressed.

I commend you for your willingness it takes to put this on your agenda and begin to dig down. Because there are people today that aren't getting the care that they probably need to be able to go back to productive work. And that's what we hope to do. We hope to give people the appropriate timely care so that issues can resolve, and they can return to the workplace so they can be productive and contribute to the system. And that is not going on. It is likely to do with the fragmentation and the vast number of carriers that we have that have come into this market very, very quickly. Many of which have very limited knowledge despite the extensive efforts that have been made by the Insurance Commission to educate them. You have a meeting and the people that go to the meeting are the people that are already paying attention. The carriers that aren't interested are the ones that have no interest and the ones that Sally [Oxley] points out. You also have serial carriers where you have a company that has a carrier for 12 months – goes out, plays golf with their agent and they say, "Well, I'll save you 20% on that." They get you hooked up with this carrier or that carrier for 12 months, and they go to another carrier. The problem is now coming home to roost. I can't predict the future. But I will tell you that you'll begin to hear more and more, not just anecdotal, but also you'll begin to see more activity in the complaint area and the protest area as people begin to figure out that it is just not working. Right now they just run into a wall and they give up. And providers are an important position to help you with that process because that's who they go to. They come to us and they say, "Well, I got hurt at work. What do I do?" And often the employer doesn't know. The carrier doesn't know. As a physical therapist the medical community stands ready to assist you in this process in trying to identify ways in which we could improve the care to injured workers, bring down costs within the system.

Thank you for your willingness to consider this. I think there is rulemaking that needs to occur. And this regulation – you can educate but you're going to have to regulate. There is going to have to be the balance between those two things. I think we are all struggling with what to the extent we should do that. Free market is a good thing, but there needs to be some accountability within that system for all that is involved. Thank you, again. I'd be happy to answer any questions you have.

Chairman Dean: Mr. Chambers, do you have any question?

Mr. Chambers: No questions. Thank you for your comments.

Chairman Dean: Mr. Dissen?

Mr. Dissen: No. Thank you.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: No.

Chairman Dean: Mr. Marshall?

Mr. Marshall: No. Thank you very much for your remarks.

Chairman Dean: Does anybody else from the public like to make a comment?

Bill Richardson, Jr.: I am a lawyer from Parkersburg, WV. I'm in private practice. I do a little bit of workers' comp work, and I do a little bit of everything else. I'm just here because I've seen too many people in my office crying about what the workers' compensation system, as it currently is, has done to them. I just have some suggestions. I'd be happy to provide them in writing to the Industrial Council, but I just thought it was time that someone came down here and said something. I think we are all well intentioned, but I don't think we realize what we're doing to people. I have seen cases where clear legal precedent from the West Virginia Supreme Court has been ignored. Complaints have been made to the Insurance Commissioner's Office, and nothing has been done with those complaints. When I say "nothing," I don't mean it that way. A letter goes out to the insurance company. Response comes back. And that response is supposed to be satisfactory. I cite particularly the Wilson Case which basically says if you injure yourself at work and are released to go back to full-time work and then you're home doing a normal activity of life and re-injure yourself, that's compensable. I have seen carriers turn that ruling on its head, refuse to follow it, and nothing has been done to them. And the normal response is, "Well, it's in litigation. You can take it through litigation." But the problem is people have to put bread on the table. And the most galling thing is, is then the carrier turns around and makes an offer to settle the claim. What can the person do? It's an obvious choice. They have to take the settlement and maybe the claim is then marked "resolved." I know Mr. Chambers had some questions about how the system is working and the number of complaints is down. Well I can tell you if somebody calls me and says, "I haven't been treated fairly," I don't tell them to file a complaint with the Insurance Commissioner's Office anymore

because I have never, unfortunately, seen it accomplish anything. I don't mean that to be rude or mean, but I think that might be one reason that complaints are down.

The medical examinations – they are anything but independent. I do very little workers' compensation work, but I'm very familiar with Dr. Mukkamala, Dr. Bachwitt and Dr. Sethi. I would encourage the Industrial Council to pass a rule that says, "We're going to establish a team of independent providers and you have to take the next one on the list," and that's the one that does the evaluation instead of letting the carrier pick the evaluation.

I have some other concerns. Like I said, I'm not here to praise Caesar, but I'm not here to bury him. I just think we need to take a long hard look at what's being done to people. I know we have a lot of carriers that are coming into the state, but unfortunately I think we might be a little bit more concerned about competition and keeping prices down and the health and safety of our workers. And I think that's very important to realize that this is the only benefit a lot of people have if they're injured at work. This is it. A lot of people don't have private insurance, making it difficult to obtain benefits that don't include pain and suffering or other considerations that are in the traditional tort system. They shouldn't make it so difficult for people that are legitimately injured to get fair benefits. I would be happy to furnish a letter or whatever to the Commission. I just have suggestions. I'm not here to condemn anybody, but I just think it's time that somebody started speaking up and letting everybody know what is going on. Thank you. I'll be happy to answer any questions.

Chairman Dean: Questions Mr. Chambers?

Mr. Chambers: No questions, but I would encourage the gentlemen to send us his suggestions.

Mr. Richardson: Thank you.

Chairman Dean: Mr. Dissen?

Mr. Dissen: No questions.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: No.

Chairman Dean: Mr. Marshall?

Mr. Marshall: No. But I think we would welcome – and I hope the OIC would too – a written summary of your questions and concerns, Bill.

Mr. Richardson: If I have any time left, I can tell you that when BrickStreet first came into the market after two and a half years I filed a Freedom of Information request – what complaints had been filed against BrickStreet, what action had been taken. At that time no fine had been levied against BrickStreet for any claims handling violation. I filed a similar complaint after another two and a half years have gone by, and the first response I got there were 20 fines that were levied that averaged about. . .in 20 different cases. So that was about \$12,000.00 and 20 violations. You can see it doesn't take a lot of denying a claim to reach that. So I will send suggestions in and I appreciate you looking at them.

Chairman Dean: Thank you. Does anybody else from the general public have any comments?

7. Old Business

Chairman Dean: Does anybody from the Industrial Council have anything they would like to bring up under old business? Mr. Chambers?

Mr. Chambers: Nothing else.

Chairman Dean: Mr. Dissen?

Mr. Dissen: No, sir.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: No.

Chairman Dean: Mr. Marshall?

Mr. Marshall: None.

8. New Business

Chairman Dean: Does anybody from the Industrial Council have anything they would like to bring up under new business? Mr. Chambers?

Mr. Chambers: No, sir.

Chairman Dean: Mr. Dissen?

Mr. Dissen: No, sir.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: No.

Chairman Dean: Mr. Marshall?

Mr. Marshall: No, Mr. Chairman.

9. Meeting Schedule Discussion

Chairman Dean: Next is the meeting schedule discussion.

Ms. Pickens: I'm certainly gathering from the general discussion here today, it is likely that the Council will want to meet again in May. We already have a meeting scheduled. We put it on there to make sure to get back to a discussion from earlier this year. The default position in the rule is quarterly meetings, obviously more frequently if there are issues to be discussed. When the Industrial Council was first convened there was a lot of rulemaking activity, which you would expect in a new system needing a lot of change. At this point a lot of the rules that needed to be worked on and amended and new rules proposed, and we've worked through a lot of that. Unless there is something to really come before the Committee, there is a cost to these meetings and there are resources needed and that type of thing. We just wanted to put this out there for general discussion. To make sure everybody knows, you don't have to meet every month if there is nothing to come before the Committee. Obviously, we want to meet as often as the Committee needs to meet, and we have a schedule that has monthly meetings so that we know the room is available and that type of thing. Again, we just wanted to mention that because there was some discussion earlier in the year. It was during the legislative session, and resources really were focused up there [Legislature]

quite honestly. We did not have the time to put together lengthy agendas, and there was nothing at that point to cause the group to come together. We wanted to mention that, and to just keep it in mind.

Chairman Dean: What date is our May meeting?

Mr. Chambers: June 2nd according to my calendar.

Chairman Dean: We'll go ahead and schedule our meeting for June 2nd.

Commissioner Cline: Are you skipping May? It is so late in April this time.

Chairman Dean: So our next meeting is June 2nd.

Mr. Hartsog: May I ask a question?

Chairman Dean: Yes, sir.

Mr. Hartsog: Are you going to be ready for us, or can you be ready earlier to talk about the topics that we went over today?

Ms. Pickens: I don't think we would be ready earlier. We'll certainly have some information to report on June 2nd.

Chairman Dean: The meeting is scheduled for June 2nd. Does that meet everybody's calendar okay?

Mr. Chambers: That's at 1:00 p.m.?

Ms. Pickens: That was my question – if we are at 1:00 p.m. or at 3:00 p.m. because we had been having them at 3:00 p.m.

Chairman Dean: We were at 3:00 p.m. and then we moved to 1:00 p.m. What suits the Council?

Mr. Dissen: I think the reason they moved the meeting to 1:00 p.m. is especially for the guys who travel. They can have lunch, have the meeting and then head home. I think that's the reason why it changed.

Chairman Dean: So is 1:00 p.m. suitable?

Ms. Pickens: Sure.

Mr. Marshall: It works for me.

Chairman Dean: Any other questions on the scheduled next meeting? Seeing none, I'll entertain a motion for adjournment.

10. Adjourn

Mr. Dissen made the motion to adjourn. The motion was seconded by Mr. Hartsog and passed unanimously.

There being no further business the meeting adjourned at 2:54 p.m.